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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

CHRISTINA CHRISTNER,

Plaintiff and Respondent,

v.

KIERON C. SWEENEY,

Defendant and Appellant.

H040736
(Santa Clara County
Super. Ct. No. 113DV016845)

I. INTRODUCTION

Appellant Kieron C. Sweeney and respondent Christina Christner had a personal and business relationship that resulted in Christner filing a request for a temporary restraining order under the Domestic Violence Protection Act (DVPA) (Fam. Code, § 6200 et seq.)¹ On August 29, 2013, the trial court held an evidentiary hearing and denied Christner’s request in an oral ruling from the bench. The trial court also denied Sweeney’s request for attorney’s fees, which he argued at the conclusion of the August 29, 2013 evidentiary hearing. In denying attorney’s fees, the trial court stated: “I’m not sure that you’ve got a statute that you can cite that entitles your client to attorney’s fees in a DVPA action.”

¹ All further statutory references are to the Family Code unless otherwise indicated.

On appeal from the August 29, 2013 ruling, Sweeney contends that the trial court abused its discretion by failing to award him attorney's fees as the prevailing party under section 6344 and as sanctions for Christner's litigation conduct under section 271. For reasons that we will explain, we determine that remand is appropriate because the trial court may have assumed there was no statutory authority for an award of attorney's fees in connection with a request for a restraining order under the DVPA. We will therefore remand the matter with directions to the trial court to hold a noticed hearing and to reconsider its August 29, 2013 ruling on Sweeney's attorney's fees request in accordance with the applicable legal principles, including sections 6344 and 271.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Request for a Domestic Violence Restraining Order

In April 2013 Christner filed a Judicial Council form DV-100 request for domestic violence restraining order under the DVPA, section 6200 et seq. She sought restraining orders directing Sweeney not to harass or contact her and to stay at least 300 yards away from her. In her supporting declaration, Christner stated that she had dated Sweeney for one year and he was her ex-boyfriend. Christner also described Sweeney's recent behavior that she believed was harassment, such as sending her hundreds of unwanted texts, emails, and messages and appearing uninvited at her home and business.

In August 2013 Sweeney filed a Judicial Council form DV-120 response to request for domestic violence restraining order. In his response, Sweeney indicated, by checking the appropriate box on the form, that he did not agree to the orders requested by Christner. He also indicated by checking the appropriate box that he requested the trial court "to order payment of my lawyer's fees and costs."

Sweeney stated in his supporting declaration that during their personal relationship he and Christner "spoke, texted, and emailed extremely frequently." They also became involved in a business relationship when Sweeney suggested that Christner become a distributor in Sweeney's multilevel marketing business, ViSalus, so that she would have a

source of income when she joined him at his home in Canada. According to Sweeney, he continued to contact Christner because they had an ongoing business relationship. He also continued to contact Christner because she had not told him that their romantic relationship had ended and to stop contacting her.

Additionally, Sweeney submitted the declaration of Julie Howgate, who stated that she began dating Sweeney in January 2013 and that in April 2013 they committed to being “life partners.”

B. Hearing on Request for a Domestic Violence Restraining Order

An evidentiary hearing on Christner’s request for a domestic violence restraining order was held on August 29, 2013. During the hearing, Christner and Sweeney testified as to their different recollections of their relationship and their contacts.

Christner testified in detail as to the incidents in which Sweeney appeared uninvited at her home and business and continued to frequently text her after he ended their relationship in December 2011. She contacted the Royal Canadian Mounted Police in September 2012 and asked that Sweeney be told not to contact her again. The Canadian police advised Christner that they had gone to Sweeney’s home and instructed him not to contact her. However, Sweeney continued to contact Christner and she became frightened in March 2013 when he texted her one night saying that he was nearby and wanted to talk.

Sweeney stated in his testimony that he and Christner had contacted each other by text, phone, and email approximately 10-20 times per day during their relationship. In January 2012 Christner told Sweeney that she did not want to be with him, which he understood to mean that she “need[ed] space.” For the next six months, Christner continued to tell Sweeney that she loved him and reassured him that she was going to move to Canada, marry him, and start a family with him. In August 2013 Christner told Sweeney that she was ending the relationship, but he thought she was just confused. Although Christner did not tell Sweeney to stop texting or emailing her, he reduced the

number of times he contacted her. Some of the contacts related to their business relationship, including his creation of a second Facebook profile in order to observe Christner's business activity after she blocked him from her Facebook page.

Witness Judy Baker testified that she was a friend of both Christner and Sweeney. Baker was also involved in the ViSalus business. She observed Christner and Sweeney at a ViSalus company event in July 2012 where they appeared to be a dating couple.

C. August 29, 2013 Trial Court Rulings

At the conclusion of the August 29, 2013 evidentiary hearing on Christner's request for a domestic violence restraining order, the trial court denied the request in a ruling from the bench. Among other things, the court found that "[w]hat happened here was a very messy break up. . . . It is not domestic violence."

Immediately after the trial court made its ruling, Sweeney made an oral request for attorney's fees that the trial court denied in the following colloquy:

"[SWEENEY'S ATTORNEY]: Your Honor, may I briefly be heard. Given the Court's finding at this time I'm asking the Court . . . to fine [Christner] with sanctions, specifically attorney fees. . . .

"THE COURT: I'm not sure that you've got a statute that you can cite that entitles your client to attorney's fees in a DVPA action. That's denied.

"[SWEENEY'S ATTORNEY]: Your Honor, can we reserve that issue.

"THE COURT: No. I've made my ruling. [¶] To that end, if you need more information, notwithstanding the adamancy of my judgment, there were excessive phone calls. . . . She decided she didn't want to have any direct contact. [¶] . . . [¶] . . . So I guess it wasn't completely unwarranted initially."

D. February 26, 2014 Trial Court Order

The record reflects that Sweeney filed a December 2, 2013 motion in which he sought attorney's fees of \$49,812.50 under section 6344 as the prevailing party in a

domestic violence matter and under section 271 as sanctions. The December 2, 2013 motion was not included in the record on appeal.

The trial court held a hearing on Sweeney's December 2, 2013 motion for attorney's fees on January 6, 2014. The court denied the motion in its February 26, 2014 written order on the ground of "lack of jurisdiction, [Sweeney] having failed to seek relief from the Court's August 29, 2013, order denying sanctions and denying the reservation of jurisdiction on that issue."

III. DISCUSSION

A. Appealability

Sweeney's notice of appeal, filed on February 25, 2014, expressly states that he appeals from the August 29, 2013 "judgment after court trial." The notice of appeal does not mention the February 26, 2014 order denying his December 2, 2013 motion for attorney's fees that was filed one day later.

Our review of the record on appeal shows that on August 29, 2013, the trial court made an oral ruling from the bench denying Sweeney's oral request for attorney's fees. The record does not show that the August 29, 2013 order was ever made or entered in writing.

It is well established that an oral ruling on a motion is not an appealable order. (*In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1170.) As this court has stated, "a writing is essential to avoid the uncertainty that can arise when attempting to enforce an oral ruling. Indeed, an 'order' is defined by statute as the 'direction of a court or judge, *made or entered in writing . . .*' (Code Civ. Proc., § 1003, italics added.)" (*In re Marcus* (2006) 138 Cal.App.4th 1009, 1016.)

"An appealable judgment or order is essential to appellate jurisdiction, and the court, on its own motion, must dismiss an appeal from a nonappealable order. [Citation.]" (*Art Movers, Inc. v. Ni West, Inc.* (1992) 3 Cal.App.4th 640, 645.) We

requested supplemental briefing from the parties regarding whether the appeal must be dismissed because it is taken from the nonappealable oral ruling of August 29, 2013.

We understand Sweeney to argue in his supplemental briefing letter that his February 25, 2014 notice of appeal should be treated as having been filed immediately after February 26, 2014 “judgment” that restated the trial court’s August 29, 2013 oral ruling on his oral request for attorney’s fees. He refers to California Rules of Court, rule 8.104.² Rule 8.104(d)(2) provides: “The reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment.” Sweeney asserts that his appeal of the August 29, 2013 oral ruling should be deemed an appeal from the February 26, 2014 “appealable final judgment” under rule 8.104.

Christner contends in her supplemental letter brief that Sweeney’s appeal is taken from the nonappealable oral denial of Sweeney’s request for attorney’s fees on August 29, 2013, and therefore the appeal should be dismissed.³ Christner also seeks an award of costs on the ground that Sweeney’s appeal is frivolous.

² All further references to rules are to the California Rules of Court.

³ At oral argument, Christner’s attorney also argued that the trial court lacked jurisdiction at the time of the January 6, 2014 hearing to reconsider the court’s August 29, 2013 oral ruling denying Sweeney’s request for attorney’s fees because Sweeney did not bring a timely motion for reconsideration under Code of Civil Procedure section 1008. We disagree, since Code of Civil Procedure section 1008 expressly provides that the time limit for bringing a motion for reconsideration is triggered by a *written notice of entry of order*. Code of Civil Procedure section 1008 states: “When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, *within 10 days after service upon the party of written notice of entry of the order* and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order.” (*Id.*, subd. (a), italics added.) Code of Civil Procedure section 1008 also states: “This section specifies the court’s jurisdiction with regard to applications for reconsideration of its orders and renewals of previous motions, (continued)

The California Supreme Court has instructed that a notice of appeal “ ‘ “shall be liberally construed in favor of its sufficiency.” ’ ” (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 20.) Our Supreme Court has also instructed that an order denying an award of attorney fees is generally appealable as an order entered after judgment. (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 654-655; see Code Civ. Proc., § 904.1, subd. (a)(2).) We will therefore exercise our discretion under rule 8.104(d)(2) to deem this appeal to have been taken from that portion of the February 26, 2014 order memorializing in writing the trial court’s August 29, 2013 oral ruling denying Sweeney’s request for attorney’s fees. Since Sweeney expressly seeks appellate review of the August 29, 2013 oral ruling, we do not address the merits of that portion of the February 26, 2014 denying Sweeney’s December 2, 2013 motion for attorney’s fees.

B. Attorney’s Fees Order

As we have noted, Sweeney indicated on his Judicial Council form DV-120 response to request for domestic violence restraining order that he sought a court order awarding him attorney’s fees and costs. On appeal, Sweeney argues that the trial court abused its discretion in denying his August 29, 2013 oral request for attorney’s fees because Christner filed a meritless request for a domestic violence restraining order, and therefore he is entitled to an award of attorney’s fees as the prevailing party pursuant to section 6344 and as sanctions under section 271.

and applies to all applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final. . . .” (*Id.*, subd. (e); see *Case v. Lazben Financial Co.* (2002) 99 Cal.App.4th 172, 179.) Here, the 10-day time limit for a motion for reconsideration was not triggered by the August 29, 2013 ruling since it was not a written order and there was no written notice of entry of order.

Christner asserts that Sweeney did not request attorney's fees under sections 6344 and 271 during the proceedings held on August 29, 2013. She also argues that the statutory requirements of notice and a hearing for an award of attorney's fees under sections 6344 and 271 were not met.

We will begin our analysis of the parties' contentions by addressing the basis for the trial court's ruling, as indicated in the following colloquy at the conclusion of the August 29, 2013 hearing:

“[SWEENEY’S ATTORNEY]: Your Honor, may I briefly be heard. Given the Court’s finding at this time I’m asking the Court . . . to fine [Christner] with sanctions, specifically attorney fees. . . .

“THE COURT: I’m not sure that you’ve got a statute that you can cite that entitles your client to attorney’s fees in a DVPA action. That’s denied.”

The above colloquy shows that the trial court may have assumed that there was no statutory authority for an award of attorney's fees in connection with a request for a restraining order under the DVPA. However, “family law courts are authorized to impose attorney fee awards as sanctions against persons who frivolously or maliciously and without probable cause request DVPA restraining orders. (. . . §§ 271,^[4] 6344; [citation].” (*S.A. v. Maiden* (2014) 229 Cal.App.4th 27, 38.)

⁴ Section 271, subdivision (a) provides: “Notwithstanding any other provision of this code, the court may base an award of attorney’s fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney’s fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties’ incomes, assets, and liabilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed. In order to obtain an award under this section, the party requesting (continued)

Section 6344, subdivision (a) “states that in connection with a proceeding concerning a domestic violence restraining order, ‘[a]fter notice and a hearing, the court may issue an order for the payment of attorney’s fees and costs of the prevailing party.’ [Citation.]” (*Loeffler v. Medina* (2009) 174 Cal.App.4th 1495, 1508, fn. omitted.)

Section 271 “advances the policy of the law ‘to promote settlement and to encourage cooperation which will reduce the cost of litigation.’ [Citation.] Family law litigants who flout that policy by engaging in conduct that increases litigation costs are subject to the imposition of attorneys’ fees and costs as a sanction. [Citations.]” (*In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161, 177.)

The standard of review for an order granting or denying a motion for attorney’s fees under the Family Code is abuse of discretion. (*In re Marriage of Turkanis & Price* (2013) 213 Cal.App.4th 332, 345.) “All exercises of discretion must be guided by applicable legal principles, however, which are derived from the statute under which discretion is conferred. [Citations.] If the court’s decision is influenced by an erroneous understanding of applicable law or reflects an unawareness of the full scope of its discretion, the court has not properly exercised its discretion under the law. [Citation.] Therefore, a discretionary order based on an application of improper criteria or incorrect legal assumptions is not an exercise of informed discretion and is subject to reversal. [Citation.]” (*Farmers Ins. Exchange v. Superior Court* (2013) 218 Cal.App.4th 96, 106; see also *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435-436 [order based on incorrect assumptions calls for reversal].)

In the present case, the record reflects that when the trial court made its oral ruling on August 29, 2013, denying Sweeney’s request for attorney’s fees, the ruling was based upon an assumption regarding the court’s lack of statutory authority to award attorney’s

an award of attorney’s fees and costs is not required to demonstrate any financial need for the award.”

fees. In denying the request, the trial court told Sweeney that the court was “not sure that you’ve got a statute that you can cite that entitles your client to attorney’s fees in a DVPA action.”

We therefore find that the trial court did not exercise its discretion under sections 6344 and 271 to either award or deny attorney’s fees in connection with a request for a restraining order under the DVPA. Under these circumstances, the proper remedy is a remand to the trial court “to permit that court to exercise *informed* discretion with awareness of the full scope of its discretion and applicable law. [Citations.]” (*F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 16.)

For these reasons, we will remand the matter to the trial court with directions to hold a noticed hearing on Sweeney’s request for attorney’s fees and to reconsider his August 29, 2013 attorney’s fees request in accordance with the applicable legal principles, including sections 6344 and 271. We express no opinion regarding the merits of Sweeney’s request for attorney’s fees or the outcome of the hearing.

IV. DISPOSITION

The August 29, 2013 oral ruling denying appellant Kieron C. Sweeney’s request for attorney’s fees, as memorialized in the order filed on February 26, 2014, is reversed. The matter is remanded with directions to the trial court to hold a noticed hearing on Sweeney’s request for attorney’s fees and to reconsider the August 29, 2013 attorney’s fees request in accordance with the applicable legal principles, including Family Code sections 6344 and 271. Each party is to bear its own costs on appeal.

BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

MIHARA, J.

MÁRQUEZ, J.